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No. 80-1429

In The

Supreme Court of the United States

October Term, 1981

DUANE YOUNGBERG, ET AL,
Petitioners,
vs.
NICHOLAS ROMEO, an incompetent,
by his Mother and Next Friend, PAULA ROMEO
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AMICI CURIAE BRIEF OF THE STATES OF CONNECTICUT, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, INDIANA, KANSAS, LOUISIANA, MAINE, MICHIGAN, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NORTH DAKOTA, OHIO, OREGON, RHODE ISLAND, SOUTH CAROLINA, VIRGINIA, WASHINGTON AND WEST VIRGINIA IN SUPPORT OF THE PETITIONERS

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TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	8
ARGUMENT	9
I. The Court Below Erred in Holding that the Respondent had a Constitutional Right to "Adequate" Treatment	9
II. The Court Below Erred in Holding that the Constitution Places Substantive Limitations on Treatment Alternatives by Requiring the Treatment Provided to be the "Least Intrusive" Alternative	22
III. The Standards Enunciated by the Court Below With Respect to the Use of Restraints and Protection from Harm Create what Amounts to Strict Liability for Those who Provide Services to the Mentally Retarded which is Neither Required by the Constitution nor Desirable as a Restriction on Professional Judgment Regarding Suitable Care	28
Conclusion	34

TABLE OF CITATIONS

Cases:	Pages
Addington v. *Texas*, 441 U.S. 418 (1979)	1,5,18
Association of Retarded Citizens of North Dakota v. *Link*, No. A1-80-141 (D.N.D.)	7
Bell v. *Wolfish*, 441 U.S. 520 (1979)	29
Connecticut Ass'n for Retarded Citizens v. *Thorne*, No. H-78-653 (D. Conn.)	7
Covington v. *Harris*, 419 F.2d 617 (D.C. Cir. 1969)	11
Dandridge v. *Williams*, 397 U.S. 471 (1970)	12
Estelle v. *Gamble*, 429 U.S. 97 (1976)	29
Flagg Bros., Inc. v. *Brooks*, 436 U.S. 149 (1978)	14
Garrity v. *Gallen*, C.A. No. 78-116 (D.N.H.)	7
Gary W. v. *State of Louisiana*, 437 F. Supp. 1209, 125 (E.D. La. 1976)	21
Goodman v. *Parwatiker*, 570 F.2d 801, (8th Cir. 1978)	30
Halderman v. *Pennhurst State School and Hospital*, 446 F. Supp. 1295 (E.D. Pa. 1977) *substantially aff'd on other grounds*, 612 F.2d 84 (3rd Cir. 1979) *(en banc), rev'd and remanded*, 101 S.Ct. 1531 (1981)	5,12,14, 19,27,28
Harper v. *Cserr*, 544 F.2d 1121 (1st Cir. 1976)	30

	Page
Harris v. *McRae*, 100 S.Ct. 2671 (1980)	28
Henkin v. *Department of Social Services*, No. 78-4088 (D.S.D.)	7
Humphrey v. *Cady*, 405 U.S. 504 (1972)	
Illinois Association for Retarded Citizens v. *Thompson*, No. 80-C-0914 (N.D. Ill.)	15,18
Illinois State Board of Elections v. *Socialist Workers Party*, 440 U.S. 173 (1979)	25
Ingraham v. *Wright*, 430 U.S. 651 (1977)	30
Jackson v. *Indiana*, 406 U.S. 715 (1972)	1,2,15, 16,18
Medley v. *Ginsberg*, C.A. No. 78-2099 CH (S.D. W.Va.)	7
New Jersey Association for Retarded Citizens, Inc. v. *Klein*, No. 79-1632 (D. N.J.)	7
New York State Ass'n for Retarded Children, Inc. v. *Rockerfeller*, 357 F.Supp. 752 (E.D. N.Y. 1973)	11
O'Connor v. *Donaldson*, 493 F.2d 507, 521 (5th Cir. 1974), *rev. and remanded*, 422 U.S. 563 (1975)	1,11,12, 13,16,17, 19,21
Par ham v. *J.R.*, 442 U.S. 584 (1979)	1,13

	Page
Paratt v. *Taylor*, 49 U.S.L.W. 4509 (May 19, 1981)	20,31
Patton v. *Dumpson*, 425 F.Supp. 621 (S.D. N.Y.) (1977)	11
Paul v. *Davis*, 424 U.S. 693 (1976)	31
Rone v. *Fireman*, 473 F.Supp. 92 (N.D. Ohio 1979)	12,21,27
San Antonio Independent School District v. *Rodriquez*, 441 U.S. 1 (1973)	12
Scott v. *Plante*, No. 73-1052 (D. N.J.), 641 F.2d 117 (2nd Cir. 1981) *cert. pending*, 49 U.S.L.W. 3790 (April 21, 1981)	7
Shapiro v. *Thompson*, 394 U.S. 618 (1969)	29
Shelton v. *Tucker*, 364 U.S. 479 (1960)	25
Sherbert v. *Verner*, 374 U.S. 398 (1963)	29
State v. *Sanchez*, 80 N.M. 438, 457 P.2d 370 (1969), *dismissed for want of a substantial federal question*, 396 U.S. 276 (1970)	25
Washington Association for Retarded Citizens v. *Thomas*, No. C-79-1235 V (W.D. Wash.)	7
Wyatt v. *Stickney*, 344 F.Supp. 387 (M.D. Ala. 1972) *aff'd in part, rem. in part, rev'd in part, Wyatt* v. *Aderholdt*, 503 F.2d 1305 (5th Cir. 1974) *modified in part, Wyatt* v. *Ireland*, No. 3195-W (M.D. Ala. Oct. 25, 1979)	3,4,11, 12,21,26

Page

Statutory Material:

42 C.F.R. 442.438 31

U.S.S. Ct. Rule 36.4 2

Miscellaneous:

Amici Curiae Brief of the Congress of Advocates for the Retarded, Inc., *et al.*, in *Pennhurst State School* v. *Halderman*, No. 79-1404, 79-1408, 79-1414, 79-1415, and 79-1489 (U.S.S. Ct.)..... 9,26

Bachrach, *Is the Least Restrictive Environment Always the Best? Sociological and Semantic Implications*, 31 Hosp. and Comm. Psychiat. 97 (1980) 6

Bailey, *Wanted: A Rational Search for the Limiting Conditions of Habilitation in the Retarded*, 1 Analysis and Intervention in Developmental Disabilities No. 1, 45 (1981) 5

Balla, *Relationship of Institution Size to Quality of Care: A Review of the Literature*, 81 Am. J. of Mental Deficiency No. 2, 117 (1976) 6

Baumeister, *The American Residential Institution: Its History and Character* in Residential Facilities for the Mentally Retarded 4, 5 (Baumeister and Butterfield eds. 1970) 17

Baumeister, *The Right to Habilitation: What Does It Mean?*, 1 Analysis and Intervention in Developmental Disabilities, No. 1, 61 (1981) ... 5,22

Page

Berkowitz, *AAMD National Office News*, 17 Mental Retardation No. 1, 47 (1979) 6

Best, PUBLIC PROVISION FOR THE MENTALLY RETARDED IN THE UNITED STATES (1965)..... 17

Burstein, *Using Mechanical Restraints on Acutely Disturbed Psychiatric Patients*, 26 Hosp. & Comm. Psychiat. 757 (1975) 31

Ellis, *The Partlow Case: A Reply to Dr. Roos*, 5 Law and Psych. Rev. 15 757 (1975) 4,18

Eyman, *et al.*, *Maladaptive Behavior and Community Placement of Mentally Retarded Persons*, 82 Am. J. of Mental Deficiency, No. 2, 137 (1977)..... 6

Eyman, *et al.*, *Patterns of Care for Mentally Retarded Persons*, 18 Mental Retardation, No. 2, 63 (1980)..... 6

Eyman, et al., *Trends in Maladaptive Behavior of Mentally Retarded Persons Placed in Community and Institutional Setting*, 85 Am. J. of Mental Deficiency 473 (1981) 9

Ferleger, *et al.*, *Anti-Institutionalization: The Promise of the Pennhurst Case*, 31 Stan. L. Rev. 717 (1979)..... 11,12

Government Accounting Office, Returning the Mentally Disabled to the Community: Government Needs to do More (1977) 1

Page

Kauffman, *et al.*, *The Cult of Educability: Searching for the Substance of Things Hoped For: The Evidence of Things Not Seen*, 1 Analysis and Intervention in Developmental Disabilities, No. 1, 53 (1981) 5

Lipman, *et al.*, *Psychotropic Drugs and Mentally Retarded Children* in PSYCHOPHARMACOLOGY: A GENERATION OF PROGRESS (Lipton, DiMascio and Killam, eds 1978) 23

Lipton, *et al.*, *The Role of Drugs in the Prevention and Treatment of Mental Retardation* in RESEARCH TO PRACTICE IN MENTAL RETARDATION, Vol. III, (Miller, ed. 1977) 23

Meyer, *Attitudes of Parents of Institutionalized Mentally Retarded Individuals Toward Deinstitutionalization*, 85 Am. J. of Mental Deficiency, No. 2, 184 (1980) 6

National Association of State Mental Retardation Program Directors, Inc., Trends in Capital Expenditures for Mental Retardation Facilities: A State-by-State Survey (1980) 1

Note, *Less Drastic Means and the First Amendment*, 78 Yale L. J. 464 25

Pagel, *et al.*, *Readmissions to a State Hospital for Mentally Retarded Persons: Reasons for Community Placement Failure*, 116 Mental Retardation 164 (1978) 10

Payne, *The Deinstitutional Backlash*, 14 Mental Retardation 43 (1976) 6

Page

Perr, *The Most Beneficial Alternative: A Counterpoint to the Least Restrictive Alternative*, VI Bull. of Am. Ac. of Psychiat. and the Law, No. 4, IV (1978) 6

Richardson, *Freedom of Expression and Function of the Courts*, 65 Harv. L. Rev. 1, 40 (1950) 27

Roos, *Custodial Care for the "Subtrainable" — Revisiting an Old Myth*, 5 Law and Psych. Rev. 1 (1979)..... 17,18

Rosen, *et al.*, *The Role of Physical Restraints in the Treatment of Psychiatric Illness*, 39 J. Clin. Psychiat. 228 (1978) 31

Rosenberg, *et al.*, *Developmental Disability Law: A Look into the Future*, 31 Stan. L. Rev. 817 (1979)..... 3

Schalock, *et al.*, *Community Integration of Mentally Retarded Adults: Community Placement and Program Success*, 85 Am. J. of Mental Proficiency 478 (1981) 10

Spece, *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 Ariz. L. Rev. 1 (1978)..... 11

Sutter, *et al.*, *Comparison of Successful and Unsuccessful Community Placed Mentally Retarded Persons*, 85 Am. J. of Mental Deficiency 262 (1980)..... 10

Taylor, *et al.*, Title XIX and Deinstitutionalization: The Issue for the 80's (1981)..... 1

Page

Throne, *Deinstitutionalization: Too Wide a Swath*, 17 Mental Retardation 171 (1979) 6

Tribe, American Constitutional Law (1978) 27

Woods, *et al.*, *Conflict of Rights: Implications for Mental Patients' Right to Adequate Protection in Light of the Right to Least Restrictive Treatment*, 4 Law and Psych. Rev. 191 (1978) .. 24

INTEREST OF AMICI CURIAE

The last ten years have seen a significant improvement in conditions at state mental retardation facilities. The population of the large institutions has declined significantly[1] and habilitative services within many of the institutions have improved markedly by virtue of participation in the Intermediate Care Facilities/Mental Retardation Program under Title XIX (Medicaid) of the Social Security Act.[2]

Although this Court has offered guidance on the procedural safeguards that must be followed before an involuntary commitment, *Parham* v. *J.R.*, 442 U.S. 584 (1979); *Addington* v. *Texas*, 441 U.S. 418 (1979), and has ruled on the state interests that are sufficient to justify a commitment, *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975), *Jackson* v. *Indiana*, 406 U.S. 715 (1972), very little has been resolved regarding the impact of the Constitution on the condition of state mental retardation facilities. This *amici curiae* brief is sponsored

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[1]One study has found that the population of public mental retardation facilities declined from a peak of 193,200 in 1967 to 168,300 by 1975. Government Accounting Office, Returning the Mentally Disabled to the Community: Government Needs to do More (1977). Another study found that the population of public institutions had declined to 133,738 by 1979 and that state projections called for an eventual decline in population to 95,093. National Association of State Mental Retardation Program Directors, Inc., Trends in Capital Expenditures for Mental Retardation Facilities: A State-by-State Survey (1980).

[2]As of 1977, 100,892 retarded persons resided in ICF/MR certified facilities, the great majority of whom resided in public institutions. Taylor, *et al.*, Title XIX and Deinstitutionalization: The Issue for the 80's (1981) p. 15.

by the States of Connecticut, Alabama, Arizona, Arkansas, Florida, Indiana, Kansas, Louisiana, Maine, Michigan, Nebraska, New Hampshire, New Jersey, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Virginia, Washington and West Virginia, by their respective Attorneys General.* The states are "interested" in this case because it affords this Court the opportunity to define clearly and comprehensively the constitutional standards of care in state mental retardation facilities. In order to plan their mental retardation services, it is of paramount concern to the states that this Court issue a definitive ruling on all issues that are presented for review.

The *amici* states are also "interested" because the Court below issued erroneous, conflicting and unworkable standards (discussed *infra*). Although the *amici* states are interested in all of the issues presented for review, the holding of the Court below that the states must provide "adequate" habilitative services,[3] Pet. App. 12a-13a, 27a, 29a, 47a, and the application of less drastic means analysis to the conditions of "confinement," Pet. App. 29a-38a, 47a, are of particular concern to the states.

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*Therefore, consent of the parties is not required for the filing of this *amici curiae* brief. U.S.S. Ct. Rule 36.4.

[3]Mentally retarded clients suffer from a state of diminished cognitive abilities/adaptive behavior that cannot be "cured" by "treatment." "Habilitation" is the term used to describe the provision of various "programs" (e.g. behavior modification, education, vocational rehabilitation, etc.) in an attempt to improve the client's level of functioning. The term "treatment" is used interchangeably with the term "habilitation" in the professional literature and lower court decisions and will be used interchangeably in this brief. To be distinguished, however, is medical treatment of illnesses/injuries, which is generally considered to be part of "care and custody" rather than "habilitation" or "treatment."

Up until the last several years, state mental retardation officials were generally recognized as being sympathetic to and supportive of class action litigation designed to improve the quality of life for their clients.[4] In recent years, however, the profession has become increasingly divided and is now in a state of total disarray over two issues: 1) whether *all* retarded clients can profit from habilitative services in a meaningful way; and of far greater concern 2) whether "least restrictive" care (assuming that the "least restrictive" care can be identified) is necessarily the best or the most appropriate care available.

The issue of whether all clients can profit from habilitative services is highlighted by the most recent developments in the frequently cited *Wyatt* litigation. *Wyatt* v. *Stickney*, 344 F.Supp. 387 (M.D. Ala. 1972) *aff'd in part, remanded in part and rev'd in part, Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974). In 1978 the State of Alabama Moved to Modify the Standards for Minimally Adequate Care and enlisted the support of a team of experts that included several of the leaders of the profession. The experts inspected the Partlow State School and concluded that a substantial number of clients had failed to benefit from Court ordered habilitative services.

> In Partlow, about two-thirds are not fully toilet trained. Records show that training has occurred over the years — toileting, bathing, dining, dressing, social, and academic skills. A careful analysis of those records reveals negligible progress for most. It is certainly not uncommon to find that a self-help skill has been taught for several years without sig-

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[4]See generally, Rosenberg, *et al., Developmental Disability Law: A Look into the Future*, 31 Stan. L. Rev. 817, 820 (1979). Obviously, a Court Order helps to insulate state facilities from the normal budgetary process.

> nificant progress....Moreover, those receiving the most intensive training, during that interval experienced no more progress than those who had received little.[5]
>
> Ellis, *The Partlow Case: A Reply to Dr. Roos,* Law and Psych. Rev. 15, 19 (1979).

A subsequent review of the professional literature was in accord with the teams finding at the Partlow School.

> On the basis of these data it cannot be concluded that profoundly retarded persons will acquire a particular skill. Yet statements of the type 'profoundly retarded persons can be taught self-help skills' are frequently made....The basis for such pronouncements is provided by evidence that *some* profoundly retarded persons learn *some* particular skill, to *some* level of mastery. None of the studies cited by Dr. Roos in support of his claim provides evidence that *all* profound/severely retarded persons can "benefit

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[5]The experts argued that an enriched recreational program should be substituted for habilitative services when the client does not significantly respond to habilitative services. The Court, acknowledged that "habilitation of some residents will only lead to modest improvements in very basic skills," but ruled that "...these facts highlight the flexibility, ingenuity, and care which must be invested in fashioning habilitation programs which will maximize a resident's human abilities and will enhance his ability to cope with his environment." *Wyatt* v. *Ireland,* No. 3195-N (M.D. Ala. October 25, 1979) p. 14.

very significantly...." Indeed no such studies exist.[6] *Id* at 23. (emphasis in original)

The issue of "least restrictiveness" is highlighted by the *Pennhurst* litigation which is familiar to this Court. *Halderman* v. *Pennhurst State School and Hospital,* 446 F.Supp. 1295 (E.D. Pa. 1977), *substantially aff'd on other grounds,* 612 F.2d 84 (3rd Cir. 1979) (*en banc*), *rev'd and remanded,* 101 S.Ct. 1531 (1981). The District Court held that all of the residents of the state facility had a constitutional right to treatment in the "least restrictive setting," 446 F.Supp. at 1319, 1320, that an institution was never the least restrictive setting, *Id.* 1320, 1325, and that the State of Pennsylvania has an obligation to create alternative community living arrangements. *Id.* at 1326. The *Pennhurst* decision has spawned tremendous controversy and conflict within the profession concerning the suitability of community living arrangements for many of the residents of state facilities, especially those profoundly/severely retarded residents who are aggressive/assaultive, self-abusive, non-ambulatory, multiply-handicapped, medically fragile or aged and resistive

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[6]On the issue of whether *all* of the mentally retarded residents can benefit from training, it is suggested that this Court refer to a symposium entitled "Are All Children Educable?" that appears in 1 Analysis and Intervention in Developmental Disabilities No. 1 (1981) (Pergamon Press). In particular this Court is referred to the following articles: Bailey, *Wanted: A Rational Search for the Limiting Conditions of Habilitation in the Retarded,* 1 Analysis and Intervention in Developmental Disabilities No. 1, 45 (1981); Kauffman, *et al., The Cult of Educability: Searching for the Substance of Things Hoped For; The Evidence of Things Not Seen,* 1 Analysis and Intervention in Developmental Disabilities No. 1, 53 (1981); Baumeister, *The Right to Habilitation: What Does it Mean?,* 1 Analysis and Intervention in Developmental Disabilities, No. 1, 61 (1981).

to leaving.[7] Throne, *Deinstitutionalization: Too Wide a Swath,* 17 Mental Retardation 171 (1979); Eyman, *et al., Maladaptive Behavior and Community Placement of Mentally Retarded Persons,* 82 Am. J. of Mental Deficiency No. 2, 137 (1977); Balla, *Relationship of Institution Size to Quality of Care: A Review of the Literature,* 81 Am. J. of Mental Deficiency, No. 2, p. 117 (1976); Eyman, *et al., Patterns of Care for Mentally Retarded Persons,* 18 Mental Retardation No. 2, p. 63 (1980); Bachrach, *Is the Least Restrictive Environment Always the Best? Sociological and Semantic Implications,* 31 Hosp. and Comm. Psychiat. 97 (1980); Perr, *The Most Beneficial Alternative: A Counterpoint to the Least Restrictive Alternative,* VI Bull. of Am. Ac. of Psychiat. and the Law, No. 4, IV (1978).

In addition to the strong professional disagreement over "least restrictive" treatment, every study of parental attitudes toward deinstitutionalization indicates strong parental opposition. Meyer, *Attitudes of Parents of Institutionalized Mentally Retarded Individuals Toward Deinstitutionalization,* 85 Am. J. of Mental Deficiency, No. 2, 184 (1980); Payne, *The Deinstitutional Backlash,* 14 Mental Retardation 43 (1976).

Notwithstanding the strong professional and parental opposition to a mandatory requirement of "least restrictive" care, a segment of the profession has turned to the Courts in an attempt to obtain a judicial resolution of the professional

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[7]Significantly, the leading professional organization, The American Association of Mental Deficiency, has withdrawn its support from the plaintiffs in the *Wyatt* litigation due to its concern that the plaintiffs would attempt to turn the focus of the litigation into a *Pennhurst* style case. Berkowitz, *AAMD National Office News,* 17 Mental Retardation No. 1, 47, 48 (1979).

dispute. The states are currently deluged with the *"Pennhurst"* styled litigation.[8] This case presents the opportunity for this Court to decide whether the Constitution requires the states to select the "least restrictive" care available. It is of paramount concern to the *amici* states that they be able to provide appropriate care unbridled by a requirement that the care be the "least restrictive" alternative.[9]

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[8]The cases include: *Connecticut Ass'n for Retarded Citizens* v. *Thorne*, No. H-78-653 (D. Conn.); *Illinois Association for Retarded Citizens* v. *Thompson*, No. 80-C-0914 (N.D. Ill.); *Association of Retarded Citizens of North Dakota* v. *Link*, No. A1-80-141 (D.N.D.); *New Jersey Association for Retarded Citizens, Inc.* v. *Klein*, No. 79-1632 (D.N.J.); *Scott* v. *Plante*, No. 73-1052 (D.N.J.); *Garrity* v. *Gallen*, C.A. No. 78-116 (D.N.H.); *Henkin* v. *Department of Social Services*, 78-4088 (D.S.D.); *Washington Association for Retarded Citizens* v. *Thomas*, No. C-79-1235V (W.D. Wash.); *Medley* v. *Ginsberg*, C.A. No. 78-2099 CH (S.D. W.Va.).

[9]The case below applies the principles of least restrictive analysis to treatment methodologies within an institution as opposed to the majority of lower court cases (discussed and cited, *infra*) which have been concerned with the choice of residential placement. The applicability of least restrictive analysis to either situation appears to be governed by the same principles of law and the *amici* states will, therefore, discuss the propriety of applying least restrictive analysis to both situations. A petition for a writ certiorari from another decision of the Third Circuit Court of Appeals that found that the criminally insane have a right to be treated in the least restrictive setting is currently before this Court. *Scott* v. *Plante*, 641 F.2d 117 (3rd Cir. 1981), *cert. pending* 49 U.S.L.W. 3790 (April 21, 1981). Pet. App. 116a-160a.

SUMMARY OF ARGUMENT

Fortified by an erroneous understanding of the nature of mental retardation, the Court below issued a series of conflicting and unworkable constitutional standards governing the care and treatment of the mentally retarded in public facilities. The standards adopted by the Court below unreasonably interfere with professional discretion by forbidding otherwise appropriate care if "less intrusive" care is available and will result in a flood of litigation against the states and a retrenchment of state mental retardation programs.

In holding that there is a state deprivation of liberty when a parent initiates a commitment pursuant to a statute which is not subject to attack, the Court below failed to understand that the role of the states is to provide necessary services for its citizenry to the extent that the state is willing to expend the necessary resources to provide such services. Furthermore, assuming that there is a state denial of liberty when a relative initiates a commitment into a state facility, active "treatment" is not constitutionally required since the provision of custodial care alone is rationally related to the legitimate state interest of providing food, shelter, supervision and care to those citizens who are unable to survive on their own. In addition, the requirement that the care provided be the "least intrusive" alternative marks an unwarranted extension of less drastic means analysis which has historically been limited to statutory enactments interfering with fundamental rights, primarily freedom of speech. Finally, the states acknowledge that they have a responsibility to protect their clients from harm and that excessive and inappropriate use of physical restraints may constitute violations of their clients' residual liberty interests; however, the standards adopted by the Court below create what amounts to strict liability for those who provide services to the retarded and unduly restricts professional judgment.

ARGUMENT

I. THE COURT BELOW ERRED IN HOLDING THAT THE RESPONDENT HAD A CONSTITUTIONAL RIGHT TO "ADEQUATE" TREATMENT.

a. The Court below repeatedly relies on findings of the nature of mental retardation that were made by the District Court and adopted by the Court below in *Halderman* v. *Pennhurst State School, supra.* Unfortunately, the *Halderman* Court made "findings" concerning the nature of mental retardation which are untrue and accepted a treatment methodology which is subject to considerable dispute.

Space limitations prevent the *amici* states from providing this Court with an understanding of the mentally retarded population in state mental retardation facilities. For an excellent summation, however, see the Amici Curiae Brief of the Congress of Advocates for the Retarded, Inc., et al, to this Court in *Pennhurst State School* v. *Halderman,* Nos. 79-1404, 79-1408, 79-1414, 79-1415 and 79-1489 (U.S.).

Two examples of the lower Court's erroneous understanding of the institutionalized population will be offered. First is the adoption of the District Court's finding in *Halderman* that the mentally retarded residents "...are not...a danger to others..." Pet. App. 13a, n. 18. This finding, however, is patently inconsistent with the finding of the Court below that the respondent was injured on over seventy occasions as a result of self-inflicted injuries *and* "...the result of attacks by other residents, some in retaliation against Romeo's aggressive behavior." Pet. App. 5a. The professional literature is in accord in that a percentage of the population of state facilities is highly aggressive/assaultive and the leading cause of failure in community living arrangements and reinstitutionalization is aggressive/assaultive behavior. Eyman, *et al., Trends in Maladaptive Behavior of Mentally Retarded Persons Placed in Community and Institutional Settings,* 85 Am.

J. of Mental Deficiency 473 (1981); Schalock, *et al., Community Integration of Mentally Retarded Adults: Community Placement and Program Success,* 85 Am. J. of Mental Deficiency 478 (1981); Sutter, *et al., Comparison of Successful and Unsuccessful Community Placed Mentally Retarded Persons,* 85 Am. J. of Mental Deficiency 262 (1980); Pagel *et al., Readmissions to a State Hospital for Mentally Retarded Persons: Reasons for Community Placement Failure,* 16 Mental Retardation, No. 2, 164 (1978).

Secondly, the Court asserted that "...mental retardation professionals have relegated the use of physical restraints to the closets of an earlier age." Pet. App. 18a. In fact, restraints are used both to protect clients and as part of behavior modification programs and their use in Title XIX ICF/MR facilities is governed by federal regulations that are inconsistent with the standards adopted below. (Discussed *infra*).

b. Fortified by an erroneous understanding of the nature of the institutionalized mentally retarded, the Court below proceeded to find a constitutional right to treatment in the least intrusive manner. At Pet. App. 12a, the Court states the three grounds that have been identified as legitimate justifications for a state deprivation of liberty (protection of society from dangerous individuals, protection of individuals who are unable to care for themselves, and treatment). The Court dismisses protection of society as a legitimate concern, since "(n)oticeably lacking...to the mentally retarded, are the traditional deterrence and retribution underpinnings of the criminal system," and since "...the state has no right to punish an innocent individual..." Pet. App. 12a. The Court then proceeds to declare that:

> In seeking to explain claimed infringements of fundamental liberty interests, the State is *limited to protection and treatment rationales* of a compelling or substantial nature. *Involuntary commitment in the civil context, then, quite clearly implicates a*

> *constitutional right to treatment and protection.* Pet. App. 13a. (emphasis added)

In accord, at Pet. App. 28a, the Court asserts that

> The right to treatment — or habilitation in the case of the mentally retarded — arises when an individual is involuntarily committed, *regardless of whether parens patriae or police power grounds provide the major premise for the confinement.* (emphasis added)

Although the *Romeo* decision did not discuss the case law in finding a constitutional right to treatment, its reasoning closely parallels the reasoning of the various lower courts that have found a constitutional right to treatment.[10] Invariably, all of the recent cases[11] finding a right to treatment

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[10]Lower Courts that have refused to find a constitutional right to treatment include *New York State Ass'n for Retarded Children, Inc.* v. *Rockefeller*, 357 F.Supp. 752 (E.D. N.Y. 173) (constitutional rights of residents in a state mental retardation facility rest on a right to be protected from harm and not on a right to treatment or habilitation); *Patton* v. *Dumpson*, 425 F. Supp. 621 (S.D. N.Y. 1977). See also *O'Connor* v. *Donaldson*, 422 U.S. 563, 573 (Burger, C.J.) (concurring opinion).

[11]The earlier theoretical basis for a right to treatment was based on a *quid pro quo* theory that treatment was required to compensate the civilly committed for the absence of procedural safequards that are afforded to criminal defendants. *Wyatt* v. *Stickney*, 325 F.Supp. 781, 784 (M.D. Ala. 1972); *Covington* v. *Harris*, 419 F.2d 617 (D.C. Cir. 1969). That theory has largely been abandoned due to the strengthening of state civil commitment statutes and the recognition that the theory is unsound for the reasons state in Chief Justice Burger's concurring opinion in*O'Connor* v. *Donaldson, supra.* See Spece, *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 Ariz. L. Rev. 1 (1978); Ferleger, *et al., Anti-Institutionalization: The Promise of the Pennhurst Case*, 31 Stan. L. Rev. 717, 734 (1979).

start with one sentence, taken out of context, from *Jackson* v. *Indiana, supra,* 738 (1972) namely that "(a)t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." From there it is asserted, without support, that the purpose of commitment is treatment; wherefore, it is concluded, treatment must be provided. See for example, *Halderman* v. *Pennhurst State School,* 444 F.Supp. 1295, 1315, 1316 (1977); *Wyatt* v. *Aderholt,* 503 F.2d 1305, 1312 (5th Cir. 1974); *Donaldson* v. *O'Connor,* 493 F.2d 507, 521 (5th Cir. 1974) *rev. and remanded* 422 U.S. 563 (1975); Ferleger, *et al., Anti-Institutionalization: The Promise of the Pennhurst Cast, supra,* 733-739.

c. The Court below, Pet. App. 10a-12a, assumes that when there is a civil commitment, there is also a state denial of liberty and a corresponding duty on the state to provide treatment.[12] In concluding that there has been a state denial

[12]It is clearly established that the states are under no constitutional obligation to provide governmental services. *Dandridge* v. *Williams,* 397 U.S. 471 (1970); *San Antonio Indepedent School District* v. *Rodriquez,* 411 U.S. 1 (1973); All of the cases that have found a constitutional right to treatment, therefore, are based on a finding of a state deprivation of liberty.

> The right of any individual to treatment exists only by reason of, and is wholly dependent on, derived from and concomitant with a deprivation by the state of the individual's Fourteenth Amendment liberty right for the purpose of treatment. *Rone* v. *Fireman,* 473 F.Supp. 92, 119 (N.D. Ohio 1979)

Some courts have assumed that all voluntary admissions are in a state facility involuntarily due to the failure of the state to create alternatives and, therefore, find that the voluntary admissions are also entitled to treatment. *Halderman* v. *Pennhurst State School,* 446 F.Supp. 1295, 1319 (1977); *Wyatt* v. *Stickney,* 344 F.Supp. 387, 390, n. 5 (1972). That approach universally puts the burden of the retarded citizens' condition on the states should the states voluntarily render services and ignore the fact that the states are under no constitutional obligation to create alternative services.

of liberty, the *amici* states maintain that the Court below failed to understand the role of the states in providing services to their citizens.

The primary role of the state is to provide necessary mental retardation services to the extent that the states are willing to expend the necessary resources. Typically, a wide variety of services are offered, including evaluation and testing, early intervention, counseling, respite care, day care, etc. Frequently, however, a family can no longer cope with the demand of a retarded family member and a state is requested to provide residential services.

In practice, the manner of admission into a state residential facility (whether committed or not) depends on whether the client is a minor and, if of legal age, whether a legal guardian has been appointed. Generally speaking, if the client is a minor, *Parham* v. *J.R., supra,* or if a legal guardian has been appointed, the client is voluntarily admitted into the facility. Clients are civilly committed by a parent or relative when the client is of legal age and a guardian has not been appointed.

The facts indicate that the respondent's mother was the petitioner in the commitment proceeding. Pet. App. 5a. Furthermore, the facts indicate that the respondent's mother and legal representatives have not requested that he be "freed";[13] instead, they take issue with the services that have been provided in the institution. Pet. App. 3a-7a.

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[13]By comparison, see *O'Connor* v. *Donaldson*, 422 U.S. at 565, 574, 575, which did not concern the validity of the initial commitment, which was initiated by Donaldson's father, but dealt with the repeated refusal of the superintendent of the facility to release him even though Donaldson was not dangerous to himself or others and was not receiving treatment.

The passage of a civil commitment statute and the creation of a Probate Court System did not deprive the respondent of his liberty or compel his mother to seek the commitment. *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149 (1978). Pennsylvania apparently did no more than it would have done if the respondent were a voluntary applicant for admission. Specifically, the State reviewed his case before admission to ensure that he was retarded and that he was an appropriate candidate for the facility.

Where the states do not initiate the commitment proceeding,[14] or do not refuse to release the client on request, the *amici* states fail to see how they deprive their citizens of liberty when they provide necessary services at the request of a family member.[15] The *amici* states further fail to see any meaningful basis for distinguishing between the duties that are owed to their institutionalized clients based on admission status, when the client's status (committed or not) depends

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[14]The various commitment statutes frequently authorize a state official to petition for commitment or authorize commitment as an alternative to an adjudication on a criminal charge. Those situations are distinguishable from the more typical case at hand since the state is involved in the initial deprivation of liberty.

[15]Indeed, but for the willingness of the states to provide services life itself would be threatened.

> Even as to those residents under the age of 18, the district court found that Pennhurst "was and is their only alternative," *id.* at 1311 (footnote omitted), and that "they are acting as the residents' only source of food, shelter, supervision, and medical care. Far from being "trivial", these services are a matter of life or death to the residents. *Halderman* v. *Pennhurst State School*, 612 F.2d 84, 125 (3rd Cir. 1979) (Seitz, C.J.) (dissenting opinion).

on arbitrary factors such as age and/or the existence of a legal guardian.[16]

d. If this Court finds that the respondent has been subject to a state deprivation of liberty, the *amici* states do not take issue with the proposition that the nature of "confinement" must bear a reasonable relationship to a legitimate state interest. The *amici* maintain, however, that it does not necessarily follow that treatment is constitutionally required. In particular, the *amici* maintain that *Jackson* v. *Indiana* does not compel the conclusion that treatment must be provided.

Jackson involved a claim by an individual who was committed pursuant to an Indiana statute that allowed for an indefinite commitment of a criminal defendant who was found to be incompetent to stand trial. This Court held that the statutory procedure employed violated due process because *the statute* was not sufficiently tailored to implement the valid state purpose of depriving incompetent criminal defendants of their liberty pending trial. In context, the sentence requiring that, "...the nature and duration of commitment bear some reasonable relation to the purpose of which the individual is committed," is solely concerned with the validity of the statutory enactment which authorized a depri-

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[16]The *amici* states do not question that state commitment statutes are subject to constitutional review to ensure that the citizenry may only be committed for legitimate reasons and to ensure procedural safeguards. See, *Addington* v. *Texas*, *supra*; *Jackson* v. *Indiana*, *supra*; *Humphrey* v. *Cady*, 405 U.S. 504 (1972). The *amici* states, however, fail to see how there is a state denial of liberty, which alledgedly raises an obligation on the states to provide habilitative services, when the respondent's mother petitioned for the commitment (pursuant to a state statute which is not subject to constitutional attack) and when the respondent's representatives have never requested that he be freed. Although a number of lower courts have assumed that there is a state deprivation whenever there is a civil commitment, that conclusion is not necessarily supported by the prior decisions of this Court.

vation of liberty and was not intended to circumscribe the conditions of confinement.[17] Indeed, throughout the opinion it is clear that Jackson could have been committed by one of the alternative statutory procedures which were sufficiently tailored to implement a valid state interest, *even though no treatment was available for Jackson's condition.* 406 U.S. at 719, 727.

In *O'Connor* v. *Donaldson, supra,* this Court reviewed a decision which held that, regardless of the basis for the civil commitment, a person confined against his will in a state institution has "a constitutional right to receive such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition." 493 F.2d at 520.

This Court was able to avoid the constitutional right to treatment claim based on the recognition by this Court that *none* of the grounds for involuntarily confining such a person were present.

> We need not decide whether, when, or by what procedures a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person — to prevent injury to the public, to ensure his own survival or safety, or to alleviate or cure his illness. For the jury found that *none of the above grounds for continued confinement was present* in Donaldson's

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[17] *Jackson* also indicated that a state cannot retain a resident when it no longer has a legitimate reason for detaining the client. 406 U.S. at 729. See also *O'Connor* v. *Donaldson, supra,* at 574, 575.

case. 422 U.S. at 573, 574. (emphasis added) (citations deleted).

This Court must now decide whether an "involuntarily confined" mentally retarded citizen has a constitutional right to habilitative services when he has been dangerous to others and is also unable to care for himself.

As indicated by Chief Justice Burger in *O'Connor* v. *Donaldson, supra,* at 581 (concurring opinion), the claim that the State has no power to confine the mentally disabled except for the purpose of providing treatment "...is surely not descriptive of the power traditionally exercised by the States in this area."

Historically, the retarded were generally neglected before 1850. Best, PUBLIC PROVISION FOR THE MENTALLY RETARDED IN THE UNITED STATES (1965). To the extent that the retarded were to be found in public residential facilities before the middle of the nineteenth century, they were found in alms houses, jails and insane asylums. Baumeister, *The American Residential Institution: Its History and Character* in Residential Facilities for the Mentally Retarded, 4, 5 (Baumeister and Butterfield, ed 1970). The earliest public facilities for the retarded were established in approximately 1850 as "schools" for the purpose of educating the retarded and returning them to society. *Id.* at 6, 7. By 1875, however, there was a reaction against the early claims of success that proved to be ill-founded and a trend began toward construction of more and larger institutions limited to providing custodial care and to protecting society. *Id.* at 9, 10. The twin purposes of custody and protection of society continued until very recent years when the "developmental model" for providing services to the retarded gained ascendancy. Roos, *Custodial*

Care for the "Subtrainable" — Revisiting an Old Myth, 5 Law and Psych. Rev. 1 (1979).[18]

In addition to the historical provision of custodial care, the accepted bases of the civil commitment power have traditionally included the police power to protect the community from those who are dangerous because of a mental disability and the *parens patriae* power to protect those who are unable to care for themselves.

> The state has a legitimate interest under its parens patriae powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill. *Addington* v. *Texas, supra,* p. 426 (1978).

See also, *Jackson* v. *Indiana, supra; Humphrey* v. *Cady, supra.*

The error of the Court below, therefore, is that it failed to recognize that the provision of care and custody validly implements the legitimate state purpose of protecting its citizens who are unable to care for themselves.

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[18]The developmental model assumes that "...each retarded person should be approached with the positive expectation that he can learn, grow and develop." Roos, *Custodial Care for the "Subtrainable"-Revisiting an Old Myth*, supra, p. 3. *Some* residents, however, have not benefited from exhaustive training efforts.

> To continue "training" without progress is to misuse resources and may even constitute abuse of a helpless person. Among the individuals now remaining in institutions are many who are not likely to profit *significantly* from formal training. Ellis, *The Partlow Case: A Reply to Dr. Roos, supra, p. 28.*

> I believe that the residents' inability to live independently distinguishes this case from *Donaldson* and other cases granting non-dangerous mental patients a right to treatment. Moreover, I believe that the state's willingness to provide the residents with such necessities as food, shelter, medical care, and supervision, for which the residents' have no other source, forms an adequate basis for some state-imposed restrictions on their liberty.[19] *Halderman* v. *Pennhurst State School,* 612 F.2d 84, 12, (C.J. Seitz) (dissenting opinion).

See also, *O'Connor* v. *Donaldson, supra,* p. 573 (Burger, J.) (concurring opinion).

In short, the *amici* maintain that the conditions of "confinement" bear a reasonable relation to a legitimate state interest when the states, pursuant to their *parens partiae* powers, provide care and custody to their citizenry who are

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[19] *The amici* states fail to understand how Chief Justice Seitz could hold in *Halderman, supra,* p. 125-127, that the provision of custodial care alone is constitutional when the resident is unable to care for himself but hold in the case below that "...the plaintiff has a constitutional right to minimally adequate care *and* treatment..." Pet. App. 54a. The *amici* maintain that Chief Judge Seitz committed the same leap in reasoning as the majority in that he first recognized that the provision of care and custody justifies a deprivation of liberty, Pet. App. 53a, but then concludes that there is a constitutional right to treatment without explaining why the provision of care and custody alone is unconstitutional. Indeed, he cites the same cases in support of his conslusion in *Romeo* that there is a constitutional right to treatment, Pet. App. 54a, that he distinguished in *Halderman*, 612 F.2d at 125, as not applying to the retarded because of the inability of the profound/severly retarded to survive on their own.

unable to survive on their own.[20] Although the states have a legitimate interest in providing habilitation in addition to care and custody, as long as care and custody are provided, the conditions of confinement are constitutional.[21]

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[20] It is not necessary for this Court to rule whether a state may commit, pursuant to its *police power*, based on a finding of mental retardation and danger to others, and provide only custodial care. The respondent was typical of the overwhelming majority of the "behavior problems" in state facilities for the retarded in that he was both "dangerous to others" and "in need of care and custody". This Court, therefore, need not address the concern of the Court below, Pet. App. 12a, that treatment is required to prevent an individual from being "punished" by indefinite "incarceration" when he has not been convicted of a crime since that concern is only present when the state acts pursuant to its police powers.

[21] The Court below looked to state law to discern that a "purpose" of commitment is the provision of treatment.

> In the present case *Romeo* was confined pursuant to §406 of the Pennsylvania Mental Health & Mental Retardation Act of 1966, which provides that commitment is for "care and treatment'. By basing *Romeo's* deprivation of liberty *at least partially* upon a promise of treatment, the state ineluctably has committed the community's resources to providing minimal treatment. Pet. App. 34a, 35a.

Given the variation between the states in the extent that services for the retarded have been funded and entitlements created for habilitative services, the *amici* states maintain that it is inappropriate for *constitutional* obligations to vary depending on the vagaries of state law. If the respondent had a right to treatment under Pennsylvania law, due process is satisfied if a state remedy is available to him to vindicate that right. *Parratt* v. *Taylor*, 49 U.S.L.W. 4509, 4512 (May 19, 1981). Furthermore, it is inappropriate for a Court to define a constitutional standard of minimally adequate care which goes beyond a state created entitlement to care, when the constitutional right to treatment is based on the state entitlement.

e. If this Court finds that there is a constitutional right to treatment, the standard that the treatment must be "adequate" is of very little assistance to the states. The fundamental question is whether, and to what extent, the states must commit resources to provide habilitative services for the institutionalized retarded. Mental retardation is not an illness to be treated by generally accepted medical practice (an "adequacy" standard), but is rather a condition of diminished cognitive capacity and adaptive behavior which may be subject to some improvement through the application of habilitative services. Until a standard is clearly defined, it is impossible to say whether or not a particular plan of habilitative services is "adequate" or not.

This Court in *O'Connor* v. *Donaldson* indicated that a Court is competent to determine that *no* treatment was provided. 422 U.S. at 573. It does not necessarily follow, however, that a Court is competent to promulgate standards of adequate care. Compare the standards for constitutionally adequate care set forth in *Rone* v. *Fireman, supra,* p. 120, with the standards of *Gary W.* v. *State of Louisiana,* 437 F.Supp. 1209, 1225 (E.D. La. 1976). Also, see the much cited decision of *Wyatt* v. *Stickney,* 344 F.Supp. 387, 395-407 (1972) where the Court detailed a set of *"minimum* constitutional standards for adequate habilitation of the mentally retarded," which governed every facet of the institution from the definition of a "qualified mental retardation professional" to when a body organ could be removed for the purpose of transplantation. It should be of interest to this Court to note that Dr. Alfred A. Baumeister[22] has written the fol-

[22]Dr. Baumeister was Professor of Psychology and Director of the University of Alabama Center for Developmental and Learning Disorders at the time of the original *Wyatt* litigation which he participated in as a witness for the plaintiffs'. He is a Past-President of the American Association of Mental Deficiency and his many publications include being the co-editor (and contributor) of the leading text on residential facilities for the mentally retarded. Residential Facilities for the Mentally Retarded (1970). (Baumeister and Butterfield, eds.)

lowing of the *Wyatt* standards:

> Although the *Standards* are those of the Court and compliance is mandated by the Court, in actuality they were prepared by lawyers for the plaintiffs and amici with the considerable assistance of mental retardation "experts." The Standards were stipulated by the State without any significant change and certainly without resistance....The "experts" who participated in the development of these Standards were not necessarily representative of the various interested professions. To my knowledge no professional organization undertook to make recommendations concerning these Standards in any formal or systematic sense....One thing is certain, however — most of these criteria cannot be justified on the basis of empirical research that existed at the time or that exists now. Baumeister, *The Right to Habilitation: What Does it Mean? supra,* p. 63.

II. THE COURT BELOW ERRED IN HOLDING THAT THE CONSTITUTION PLACES SUBSTANTIVE LIMITATIONS ON TREATMENT ALTERNATIVES BY REQUIRING THE TREATMENT PROVIDED TO BE THE "LEAST INTRUSIVE" ALTERNATIVE.

a. In addition to finding a constitutional right to "adequate" treatment, the Court below found that when a mode of treatment impinges on a protected liberty interest, the treatment must be the least intrusive available under the circumstances in order to be constitutional.[23]

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[23]The Court also singled out one accepted form of treatment, the use of restraints ("shackling"), and concluded that restraints may only be utilized if they are the "...least restrictive method of dealing with the patient." Pet. App. 18a. Discussed, *infra.*

As the basis of its holding that the mentally retarded have a right to the least intrusive treatment, the Court below cited the "...existence of a judicially assessable, discrete act, which entails a significant loss of individual liberty...." Pet. App. 30a. Although not discussed below, the Third Circuit must also have assumed judicial competence to identify alternative modes of treatment (or treatment settings) as being both "adequate" and "less restrictive."

The danger of this part of the decision below is that it declares otherwise appropriate treatment to be unconstitutional as a matter of substantive due process if "less intrusive" treatment is available, even though the "more intrusive" treatment may offer a greater likelihood of success.[24] For example, the Court below strongly suggests that the administration of psychotropic medication is an invasion of protected liberty interests which may only be justified if the treatment is the "least intrusive alternative." Pet. App. 30a-31a, 76-78a. Psychotropic medications, however, are recognized as being medically indicated for the retarded when target symptoms, such as persistent hyperactivity, combativeness, and self-mutilation are present. Lipman, *et al., Psychotropic Drugs and Mentally Retarded Children* in PSYCHOPHARMACOLOGY: A GENERATION OF PROGRESS (Lipton, DiMascio and Killam, eds. 1978); Lipton, *et al., The Role of Drugs in the Prevention and Treatment of Mental Retardation* in RESEARCH TO PRACTICE IN MENTAL RETARDATION, Vol. III (Miller, ed., 1977).

Moreover, the standard of "least intrusiveness" is unworkable due to the inability of the Court (as well as the professional and direct care staff) to identify with certainty which generally accepted treatment methodology impinges on pro-

[24]Any procedural safeguards which the state may provide before employing the challenged mode of treatment are irrelevant under the analysis of the Court below since, as a matter of substantive due process, only the least instrusive treatment is acceptable.

tected liberty interests and which treatment methodology is "least intrusive."

> Treatment programs, for example, could be governed by more than one standard. Testimony at the trial indicated that some behavior modification programs utilize "timeout" principles involving periodic mechanical restraints of the limbs to eliminate aggressive behavior. It is not clear whether such a program has to be the least intrusive alternative or only be acceptable in light of present medical or other scientific knowledge.[25] Pet. App. 51a, 52a (Seitz, C.J.) (Concurring Opinion).

b. As the Court below acknowledged, Pet. App. 32a, n. 46, "less restrictive" analysis has generally been limited to *statutory enactments* which interfere with fundamental

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[25]When dealing with an aggressive/assaultive or self-abusive client, the treatment choices include behavior modification programs and/or psychotropic medications. Given that behavior modification programs frequently include such restrictive practices as the periodic use of restraints and that behavior modification frequently extends over a long period of time and are of uncertain success, it is not clear which treatment choice is "less intrusive."

Moreover, the standards adopted by the Court below forbids the states from restraining an aggressive/assaultive or self-abusive client unless the use of restraints is the "least restrictive means of handling the resident," Pet. App. 46a, (even though restraints are frequently part of behavior modification programs) but also require the states to protect their clients from harm absent "substantial reasons." Given the existence of a substantial number of aggressive clients, it will be impossible for the various professional and direct care staff to comply with the inconsistent obligations created by the Court below. Woods, *et al., Conflict of Rights: Implications for Mental Patients' Right to Adequate Protection in Light of the Right to Least Restrictive Treatment,* 4 Law and Psych. Rev. 191 (1978).

rights, primarily freedom of speech. See *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

Even as applied to statutory enactments affecting fundamental rights, however, the concept has been cautiously applied.

> And for me, "less drastic means" is a slippery slope and also the signal of the result the Court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less "drastic" or a little less "restrictive" in almost any situation and thereby enable himself to vote to strike legislation down. *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 188 (1979) (Blackmun, J.) (Concurring opinion).

See also, Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464, 472 (1969).

Even though the Court below was aware of the historic limitations on less drastic means analysis, the Court below imposed an affirmative obligation on the states to treat their institutionalized clients in the "least intrusive" manner. It did so even though this Court may have already ruled that there is no constitutional right to treatment in the least restrictive setting. *State* v. *Sanchez*, 80 N.M. 438, 457 P.2d 370 (1969), *dismissed for want of a substantial federal question*, 396 U.S. 276 (1970).

The lower courts have varied considerably on the issue of whether the retarded have a right to be treated in the "least

restrictive setting."[26] One Court has held that the retarded have a constitutional right to be treated "...in the least restrictive setting consistent with that individual's habilitative need," that the states have a constitutional duty "...to explore and provide the least stringent practical alternatives to confinement of retarded individuals" and that an institution is never the least restrictive setting. *Halderman* v. *Pennhurst State School,* 446 F.Supp. at 1319, 1320. Another Court has held that there is a right to treatment in the least restrictive setting and that the states have a duty to "...provide community facilities and services when an individual's habilitation demands such treatment, (but that does)...not remove from the professional judgment of qualified staff members the decisions regarding the appropriateness of community placement." *Wyatt* v. *Ireland,* No. 3195-N (M.D. Ala. March 21, 1980) p. 7.

From the evidence it is clear that there is a debate within the profession concerning the beneficial effects of community placement for the severely and

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[26]A finding of restictiveness should require an analysis of the effect of the residential placement on the client's ability to leave the confines of the residential unit and to experience the environment, the client's ability to participate in gainful employment or some other regular, meaningful activity, the client's ability to recreate and to socialize with others, etc. None of the courts that have found a right to "least restrictive environment" have analyzed these factors but have simplistically assumed that community living arrangements are intrinsically "less restrictive" of liberty than institutitons. See generally, the Amici Curiae Brief of the Congress of Advocates for the Retarded, Inc., *et al.*. in *Pennhurst State School* v. *Halderman*, No. 79-1404, 79-1408, 79-1415, 79-1489 (U.S. S.Ct.) P. 6-15

Furthermore, the *amici* states fail to comprehend why considerations of comparative restrictiveness foreclose consideration of other legitimate concerns, such as the ability to protect the client from harm.

> profoundly retarded. The Court will not choose sides in this debate. Nor should it...Determining the ideal mode of treatment or ordering state institutions to implement the best system, is beyond the province of the Court. *Id.*

Finally, another Court has held that:

> As long as treatment within the hospital environment does not *by comparison unduly burden* the individual's liberty interest, the Court cannot find that the Constitution requires the provision of treatment in alternate settings. *Rone* v. *Fireman, supra,* p. 125 (emphasis added).

The *amici* states maintain that this Court should unequivocally reject "least restrictive" analysis as a substantive, constitutional limitation on the care and treatment of the mentally retarded. As noted *supra,* the concept of less drastic means has traditionally been limited to the review of statutory enactments interfering with fundamental rights and cannot be consistently applied to the care and treatment of the retarded.

> (W)hat is the least restrictive environment for any particular individual is primarily a medical question. As the record demonstrates, this concept is an uncertain one and has been subject of fervent medical debate. I feel it inappropriate for courts to make such a judgment on the basis of a doctrine that contemplates an objective, single better alternative. *Halderman* v. *Pennhurst State School,* 612 F.2d at 128. (Seitz, C.J.) (dissenting opinion).

See also Richardson, *Freedom of Expression and the Function of the Courts,* 65 Harv. L. Rev. 1, 40 (1950); Tribe, American Constitutional Law 722-23 (1978).

Furthermore, the application of "least restrictive alternative" analysis to the provision of care and treatment ignores the distinction between unwarranted government interference with protected liberty interests and the affirmative creation of an entitlement to alternative government services. *Harris* v. *McRae*, 100 S. Ct. 2671 (1980).

Finally, it is suggested that the correct standard is whether the care provided is reasonably related to *a* state interest that is sufficient to justify "confinement." The standard proposed by the *amici* states is close to the one identified by Chief Judge Seitz in his dissenting opinion in *Halderman*, 612 F.2d at 129, in that Chief Judge Seitz employs a rational relationship test and acknowledges that "(a) large scale institution is quite capable of providing its residents with adequate food, shelter, medical care and other necessities." *Id.* Instead of looking to "*the* purpose of confinement," *Id.*, however, the *amici* states suggest that the correct *constitutional* standard is whether the conditions of confinement are rationally related to *a* legitimate state interest. Where *state law* limits the purpose of confinement to the provision of treatment, due process is satisfied if there is a remedy available to vindicate the *state created* entitlement. See n. 21, *supra* p. 20.

III. THE STANDARDS ENUNCIATED BY THE COURT BELOW WITH RESPECT TO THE USE OF RESTRAINTS AND PROTECTION FROM HARM CREATE WHAT AMOUNTS TO STRICT LIABILITY FOR THOSE WHO PROVIDE SERVICES TO THE MENTALLY RETARDED WHICH IS NEITHER REQUIRED BY THE CONSTITUTION NOR DESIRABLE AS A RESTRICTION ON PROFESSIONAL JUDGMENT REGARDING SUITABLE CARE.

It follows from the argument advanced *supra* that the provision of care and custody requires the states to take reasonable steps to protect their clients from harm. The *amici* states

also acknowledge that their clients have residual liberty interests that might be violated by excessive and inappropriate use of restraints which go beyond what would reasonably be anticipated at the time of the initial commitment. The question becomes, what standard should the states be held to?

The new constitutional rights created by the Third Circuit Court of Appeals would require all of those involved in the care of the mentally retarded to demonstrate "compelling necessity" and "least restrictive alternative" in the use of restraints, and "substantial necessity" as a justification for failing to prevent harm to a particular patient.

As authority for its "compelling necessity" and "least restrictive alternative" tests as applied to the use of restraints, the Court below cited *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) and *Sherbert* v. *Verner*, 374 U.S. 398 (1963). Neither of those cases support the compelling necessity or least restrictive alternative tests enunciated in this case.[27] See *Bell* v. *Wolfish*, 441 U.S. 520, n. 14 (1979). With respect to its "substantial necessity" standard as applied to protection from harm, the Court below cited no authority for its use of this test.

In *Estelle* v. *Gamble*, 429 U.S. 97, 104-105 (1976) this Court held that "...the deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' " proscribed by the Eighth Amendment. While the Eighth Amendment's prohibition against "cruel and unusual punishment" may not be applicable to

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[27] *Shapiro* v. *Thompson* involved an equal protection challenge to state welfare residency requirements found to violate the constitutional right to travel. *Sherbert* v. *Verner* held that a denial of unemployment benefits to one who refused to work on Saturdays because of religious beliefs constituted an infringement of First Amendment rights.

patients of a state facility for the mentally retarded because its strictures are limited solely to sentenced prisoners, *Ingraham* v. *Wright*, 430 U.S. 651 (1977), the standard of care enunciated in *Estelle* v. *Gamble*, *supra*, could apply with equal force to alleged deprivation of rights under the Due Process Clause of the Fourteenth Amendment. However, once the Court below determined that this case was governed by the Fourteenth Amendment as opposed to the Eighth Amendment, it totally rejected the "deliberate indifference to serious medical needs" standard of *Estelle* v. *Gamble*, *supra*, and announced a series of rigid constitutional rights extending far beyond those considered, let alone recognized, by any other court.

Other courts, when faced with similar issues involving patients in facilities for the mentally ill, have chosen to adopt terminology consistent with the standard of deliberate indifference.

> If plaintiff can establish at trial a sufficient helplessness on the part of Rachel and a deliberate indifference toward Rachel's medical needs, including protection from assault, on the part of those caring for her, then plaintiff will have proved that she was denied her constitutional right to a humane and safe living environment while confined under state authority. *Goodman* v. *Parwatiker*, 570 F.2d 801, 804 (8th Cir. 1978).

Similarly, *Harper* v. *Cserr*, 544 F.2d 1121, 1124 (1st Cir. 1976), held that a sufficient combination of helplessness on the part of the decedent and "wanton callousness" on the part of those caring for her, might cross the line from a tort to a §1983 case under either the Eighth or Fourteenth Amendments.

While the terminology may differ slightly from "deliberate indifference" to "wanton callousness," the above-cited cases

recognize that negligence or malpractice alone does not reach the dimensions of a constitutional violation such as would afford relief under §1983 whether the analysis proceeds under the Eighth or Fourteenth Amendments. To hold otherwise, "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states." *Paul* v. *Davis*, 424 U.S. 693, 701 (1976); *Parratt* v. *Taylor*, 49 U.S.L.W. 4509, 4513 (U.S. May 18, 1981).[28]

The Court below acted under the mistaken belief that restraints and personal protection involved "undiluted legal concerns" unrelated in any way to the exercise of medical judgment. Also, the Court equated shackling with punitive sanction. Pet. App. 14a. Decisions regarding restraints and protection from other residents are frequently an integral part of a treatment program. See Rosen, *et al.*, *The Role of Physical Restraints in the Treatment of Psychiatric Illness*, 39 J. Clin. Psychiat. 228 (1978); Burstein, *Using Mechanical Restraints on Acutely Disturbed Psychiatric Patients*, 26 Hosp. & Comm. Psychiat. 757 (1975). Federal regulations recognize the use of physical restraints in behavior modification programs and as a means of protection. 42 C.F.R. §442.438. The regulations do not refer to properly used

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[28] In *Parratt* v. *Taylor*, *supra*, this Court held that the negligence of prison employees which resulted in the loss of a prisoner's hobby materials valued at $23.50 constituted a deprivation of property under color of state law. However, since the victim was entitled to a post-deprivation remedy under state law, it was held that the remedies were sufficient to satisfy the requirements of procedural due process. 49 U.S.L.W. at 4513. In this regard, it is important to emphasize that the issues involved in the present case are not procedural but substantive. As noted by Justice Powell in his concurring opinion, 49 U.S.L.W. at 4515, the substantive limitations on state actions imposed by the Due Process Clause "...may extend to *intentional* and *malicious* deprivations of liberty and property..." (emphasis added). The Third Circuit has chosen to impose substantive limitations far beyond any previously comprehended.

restraints as presumptively punitive nor do they require an otherwise appropriate use of restraints to be the least restrictive alternative available. While the Court below was concerned primarily with shackling, other forms of restraint might include soft restraints of the hands and legs, muff restraints of the hands, isolation, or a variety of medications. Decisions regarding the need for any of these forms of restraints, the circumstances under which they will be used, and the duration of their use involve an understanding of the medical and psychological history of the patient, his current circumstances, and the objectives of any program of which the particular restraint may be a component. It is not appropriate to refer to these difficult decisions as undiluted legal concerns nor is it helpful to characterize a recognized form of treatment and protection as punitive in nature. Should abuses occur which ignore accepted professional judgment and result in punitive actions on the part of professionals and staff, then §1983 would afford the victim relief under standards far less rigid than those established by the Third Circuit.

Liability in a state negligence or malpractice action would normally be found to exist where a patient could show that the care or treatment in question was an unjustified departure from established medical standards. While this Court has frequently cautioned against the creation of constitutional torts, the multitudinal standards created by the Third Circuit has caused a substantial shift of the burden of proof to the defendants thereby creating a form of constitutional strict liability. Given the ease with which professional judgments could be invalidated under the holding of the Third Circuit, it is almost assured that the federal courts will be regularly called upon to review individual programs for the care or treatment of the mentally retarded.

Under these conditions, it is not unlikely that many dedicated and experienced employees would feel compelled to seek employment elsewhere. For those who chose to remain to serve the mentally retarded, mentally ill or others in need

of special care provided by the states, the pressures and confusions engendered by these standards may well result in a retrenchment of programming and an overly-cautious approach to care and treatment which will not necessarily promote the best interests of the individuals being served.

CONCLUSION

The decision of the Court below should be reversed.

Respectfully Submitted,

THE STATES OF CONNECTICUT, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, INDIANA, KANSAS, LOUISIANA, MAINE, MICHIGAN, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NORTH DAKOTA, OHIO, OREGON, RHODE ISLAND, SOUTH CAROLINA, VIRGINIA, WASHINGTON AND WEST VIRGINIA

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